U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of	:	
	:	
CARLOS MUNGUIA,	:	Dated: April 18, 2001
Claimant	:	
	:	Case No.: 1999-LHC-00547
v.	:	OWCP No.: 18-64651
	:	
NATIONAL STEEL AND SHIPBUILDING,	:	
Employer/Self-insured	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party-in-Interest	:	

Timothy L. Brictson, Esq.
San Diego, CA
For the Claimant

Andris E. Inveiss
San Diego, CA
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER[1]

This is a claim for temporary total, permanent partial, and permanent total disability arising under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter "the Act"). The claim was filed on December 15, 1998, and assigned to me on May

[1] The following abbreviations will be used when citing to the record in this case: EX–Employer's Exhibit; CX–Claimant's Exhibit; and TR–Hearing Transcript.

2, 2000. A hearing was held on July 28, 2000 in San Diego, California. At the hearing, the parties agreed to the following stipulations: that if Joyce Gill were to testify regarding her labor market surveys on behalf of the Employer, her testimony would reflect what is contained in her labor market surveys, which have been submitted as part of Employer's exhibits in this matter; Claimant's injury arose out of and in the course of his employment; the injury occurred on a covered situs; Claimant's average weekly wage at the time of his injury was $531.40; jurisdiction exists under the Act; an employer/employee relationship existed between Claimant and Employer at the time Claimant was injured; Claimant suffered a work-related injury to his back on January 21, 1997; Employer paid compensation for temporary total disability from January 22, 1997 through August 24, 1997 at a rate of $354.27; Employer paid compensation from August 25, 1997 through December 28, 1997 at a rate of $354.27 per week;[2] and Employer paid a vocational rehabilitation maintenance allowance under the state workers compensation statute at a rate of $216.48 from December 29, 1997 to June 14, 1998.[3] In addition, Claimant's Exhibits 1 through 28 and Employer's Exhbits A through R were admitted into evidence at the hearing (TR 18-20). Employer's Exhibit R consists of a single piece of paper with the words "Videotape Surveillance, Dated 10/19/98 and 10/20/98." However, no video was submitted, and neither party addressed video surveillance in their briefs or during the hearing.

At the conclusion of the hearing, Employer was permitted to forego submitting a post-hearing brief, as its pre-hearing brief was comprehensive (TR 107). A deadline of 30 days following the hearing was set for Claimant to file his post-hearing brief (TR 107). However, Claimant failed to submit his brief by the date it was due. My law clerk contacted Mr. Brictson's office on November 15 and 16, 2000 regarding this matter. Mr. Brictson replied on November 21, stating that he still intended to file a brief. However, at the time of this decision, Mr. Brictson's brief is still outstanding. Because Claimant testified at times inconsistently with information in the record, and his attorney stated throughout the hearing that he would clarify facts in his post-hearing brief, Mr. Brictson would have been well-advised to file a post-hearing brief in this matter.

A. Background

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[2] The parties stipulated that the compensation payments from August 25, 1997 through December 28, 1997 were for permanent *partial* disability (TR 6). However, the payments during this period were in the same amount as the payments for temporary *total* disability from the day after the injury through August 24, 19997. The compensation for partial disability should not equal the compensation for total disability. This discrepancy was brought to the parties' attention at the hearing, but was never resolved (TR 7).

[3] At the beginning of the hearing, the parties also agreed that Employer paid permanent disability under the state statute from June 15, 1998 and continuing in the amount of $160 per week (TR 6). However, at the conclusion of the hearing Employer requested that the parties be allowed to clarify this period of payments and file a post-hearing stipulation (TR 106-107). The parties never filed further stipulations.

At the time of the hearing, Claimant was 53 years old and married, with one adult dependent son (TR 23). He was educated through sixth grade in Mexico, and took adult education classes to learn English when he was about 18 years old. He moved to the United States in 1965 and is a U.S. citizen (TR 24). Before working as a longshoreman, he worked as a carpenter, painter, and store clerk (TR 26). He began working for Employer in 1975 as a shipfitter helper (TR 25). He was eventually promoted to shipfitter, and was working in this capacity at the time of his 1997 injury (TR 26).

Prior to his 1997 injury, Claimant was in generally good health, although he has had epilepsy since infancy (CX 23, at 2). While his epilepsy has not significantly interfered with his daily functions, Claimant asserts that he has experienced increased symptoms since his back injury (CX 23, at 2). Further, due to the epilepsy, his driver's license was revoked (CX 23). In addition, Claimant had back injuries at work in 1986 and 1990. In September 1986, Claimant felt a sharp pain in his lower back while carrying something as he was climbing a ladder, and was diagnosed with a lumbar syndrome secondary sprain (EX P, at 373-74). He was off work for several weeks (EX P, at 375-82). He received compensation under the Act according to a settlement between himself and Employer (EX P, at 384-86). In October 1990, he fell five feet from a ladder as a result of either losing his footing or experiencing a blackout associated with epilepsy, and suffered an acute lumboscral sprain (EX P, at 389, 391). This injury caused him radicular pain and considerable soreness in his lower back (EX P, at 391). He was again off work for several weeks as a result of this injury.

On January 21, 1997, while Claimant was working the second shift, he struck a metal T-bar with a sledge hammer, and was unable to stand and straighten his back afterward (TR 30). He experienced pain in his lower back (EX B, at 3). Claimant testified that he asked his foreman if he could "go to medical," but was told that there was no medical service available at night (TR 29-30). He went to the medical department the next day, and they referred him to Larry Dodge, an orthopedic surgeon (TR 31; EX Q). Claimant saw Dr. Dodge on January 24, 1997. Dr. Dodge's narrative report of the visit states that Claimant had "moderate constant pain within his low back," but "no radicular leg pain, numbness, tingling or weakness" (EX B, at 4). Dr. Dodge further reported that Claimant's symptoms were aggravated by exercise, bending forward, coughing, and sneezing, and reduced by walking (EX B, at 4). Dr. Dodge diagnosed Claimant with a lumbosacral strain superimposed on degenerative disc disease and degenerative arthritis in the lumbar spine (EX B, at 5). He suggested that Claimant rest and take analgesic and anti-inflammatory medications (EX B, at 6).

Claimant chose not to remain in treatment with Dr. Dodge "because it was the company's

doctor," and instead selected John Finkenberg, another orthopedic surgeon, as his treating physician based on his sisters' recommendations (TR 32). Dr. Finkenberg's first notes regarding Claimant date from January 30, 1997[4] (CX 2, at 3). Dr. Finkenberg reported that Claimant complained of pain extending from his lower back into his left buttock. Initially, Dr. Finkenberg diagnosed Claimant with a herniated disk at either L4-5 or L5-S1 and L5-S1 radiculopathy (CX 2, at 3). Claimant underwent an MRI on February 15, 1997. Dr. Finkenberg saw a disc bulge at L2-3 with no significant nerve root impingement. He diagnosed Claimant with "L3-4 HNP [herniated nucleus pulposus] with discogenic back pain" (CX 2, at 4). He prescribed physical therapy for Claimant, and kept him off work for several more weeks. Claimant's back pain continued through the spring of 1997. On May 2, Dr. Finkenberg planned for Claimant to undergo a L4-5 discectomy with exploration and decompression of the left L5 nerve root (CX 2, at 9). However, Employer refused to pay for the procedure, and it was delayed indefinitely. In retrospect, the delay was beneficial, since it is clear that the surgery was not an appropriate treatment for Claimant's condition (*see infra*).

Claimant returned to Dr. Dodge on June 3, 1997. At that time he was accompanied by a Spanish interpreter (EX B, at 7). After reviewing Claimant's medical records and MRI and conducting a physical examination, Dr. Dodge reiterated his opinion that Claimant had a thorocolumbar strain, degenerative disc disease, and myofascial pain. He stated that Claimant had no limitation in his range of motion. He found that Claimant was permanent and stationary, that his disability precluded him from performing "very heavy work," and that Claimant had lost "approximately one quarter of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling and climbing or other activities involving comparable physical effort" (EX B, at 11). He further stated that Claimant could not return to his previous job (EX B, at 11).

One month later, Claimant returned to Dr. Finkenberg. At that time, Dr. Finkenberg stated that Claimant had discogenic back pain with pain radiating from the disc margin due to the back pain, but that his radiculopathy had resolved. He diagnosed Claimant with L3-4 vs. L4-5 discogenic back pain with paravertebral muscle spasm (CX 2, at 9). He stated that Claimant had "continued chronic lumbar paravertebral muscle spasms because of his disc bulging at either L3-4 or L4-5" but that Claimant "[did] not have enough herniation to demonstrate nerve root impingement or demonstrate radiculopathy" (CX 2, at 9-11). This was a significant change from his earlier diagnosis. Dr. Finkenberg gave Claimant the option of having an epidural injection, having a discogram, or considering his injury to be permanent and stationary (CX 2, at 11). Dr. Finkenberg finally gave Claimant a permanent and stationary rating on September 11, 1997. He stated that Claimant continued to have moderate to severe left thoracolumbar muscle spasms and that he was unable to do repetitive flexion and extension maneuvers (CX 2, at 12). He further stated that Claimant could not perform his job with Employer, but should seek vocational rehabilitation. His plan for future medical care did not suggest immediate surgery (CX 2, at 13). He found that Claimant could not perform "heavy work which contemplates that he has lost

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[4] Claimant incorrectly testified that he first saw Dr. Finkenberg in March (TR 32).

approximately 50% of his ability to do repetitive flexion and extension, climbing, pushing, pulling, lifting, or other maneuvers of similar effort" (CX 2, at 12). He also filled out a Work Restriction Evaluation, in which he stated that Claimant could lift, push, or pull up to 20 pounds (CX 2, at 14). It does not appear that he was asked to explain these inconsistent limitations.[5] Claimant did not receive further medical treatment for his back for almost two years (EX G, at 45).

Shortly before Dr. Finkenberg gave Claimant a permanent and stationary rating, Claimant requested vocational rehabilitation through the Department of Labor. Claimant testified that he had returned to work after his injury, but that he had to stop working because of pain (TR 34-35; EX H, at 136). Beginning on November 12, 1997, Claimant participated in vocational rehabilitation through Elliott & Associates, Inc. He received a certificate of competency in Commercial Cleaning on March 20, 1998 (CX 9). Claimant stated that he was in training for "three or two" hours a day, and asserted that he was unable to work while he completed this training program (EX G, at 95; CX 12, at 4). Even after he completed the program, Claimant continued to attend classes "to 'practice' and for fear of losing his VRMA [Vocational Rehabilitation Maintenance Allowance] checks" (CX 12, at 4). He attended classes through May 1, 1998 (EX 24, at 10). Despite his successful completion of it, Claimant asserts that this program was unsuitable for him because he is physically incapable of performing the job's demands. At a deposition in March 1999, Claimant testified that the program was not his choice, but one selected for him (EX G, at 89). However, records from Elliott & Associates indicate that this field was one in which Claimant "expressed strong interest" (CX 7, at 6). A job analysis conducted by Elliott & Associates stated that Claimant would not have to lift over 20 pounds, would only occasionally have to bend, and would never have to squat, crawl, climb, kneel, or twist as a building custodian (CX 8). The rehabilitation program was approved by Dr. Finkenberg, based on the job analysis conducted by Elliott & Associates (EX I, at 267-71). However, Claimant testified that he did have to kneel, bend, and carry over 20 pounds in his training, but that his instructor allowed him to forego many of the more physically demanding tasks of the program (EX G, at 96; CX 24, at 40-43). An Independent Vocational Evaluator found that the program exceeded Claimant's physical capabilities and that Claimant was entitled to other vocational rehabilitation (CX 12, at 9). In addition, a hearing on Claimant's state compensation claim was held in 1999 regarding the appropriateness of Claimant's first vocational rehabilitation program, where it was also found that Claimant could not perform the physical demands of a commercial cleaner (CX 24; CX 25). These findings were based on Dr. Finkenberg's restrictions; no mention was made of Dr. Dodge's restrictions, which precluded Claimant only from very heavy work.

After the Independent Vocational Evaluator determined that Claimant's first rehabilitation

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[5]According to the *Dictionary of Occupational Titles*, jobs with lifting restrictions of up to 20 pounds are characterized as light work (EX H, at 152); and medium work encompasses jobs with occasional lifting of up to 50 pounds and frequent lifting of 10-25 pounds (*id*. at 150). A restriction of "no heavy work" would not preclude medium work, or lifting up to 50 pounds. Therefore, Dr. Finkenberg's restrictions are inconsistent.

was inappropriate, Claimant was referred to a second vocational rehabilitation service for job training.[6] Claimant's first appointment with Bonnie SinClair, his second rehabilitation counselor, was on September 30, 1998. In late November 1998 Claimant independently enrolled in a food service class (CX 16, at 11). Claimant was in training from approximately 7:45 a.m. to 1:30 p.m. each day (*id.*). Ms. SinClair evaluated the program and was concerned that Claimant may have been exceeding his physical capabilities by participating in it (CX 16, at 16). Still, Claimant chose to continue in the program and maintained at the time that it was within his physical capability, and subsequent inquiries by Ms. SinClair confirmed that Claimant was correct (*e.g.*, *id.* at 27). He completed the program at the end of June 1999 (TR 47; CX 16, at 36) and participated in job placement efforts with the help of Ms. SinClair (CX 16, at 36-56; CX 20). However, he terminated his participation in job placement efforts on September 9, 1999 (CX 16, at 62). Further, when he was ostensibly looking for a job, he would tell prospective employers that he could not lift more than 20 pounds and was looking for light work (TR 62). Claimant testified that he stopped looking for work because he was having pain again, but that he planned to start looking for work after he completed physical therapy (TR 34-35). Yet he had not seen a doctor in the four months prior to the hearing (TR 57).

Around the same time that Claimant discontinued his work search, he returned to Dr. Finkenberg complaining of pain in his lower back radiating into his lower left extremity down to the toes. At this visit, he stated that he could not stand for more than a half hour before he needed to sit down (EX C, at 45). Dr. Finkenberg again considered surgery for Claimant. He stated in his notes that Claimant complained of occasional pain in his lower left extremity, and diagnosed L2-3 and L4-5 discogenic back pain (EX C, at 45-46). Claimant underwent a discogram on December 30, 1999, which was performed by Dr. Wilson (EX C, at 48). The results of the discogram were inconclusive (CX 22; EX C, at 48). Based on Dr.Wilson's findings, Dr. Finkenberg decided not to perform surgery, but suggested that Claimant might benefit from interdiscal electrothermal coagulation (IDET).[7] In a February 2000 Permanent and Stationary Evaluation, Dr. Finkenberg stated that Claimant had lumbar degenerative disc disease and facet arthritis, as well as a possible disc herniation at L4-5 and disc bulging at L2-3, but that Claimant would not benefit from surgery at the time (EX C, at 49-50).

Dr. Dodge reexamined Claimant in 1999 and 2000. He reported that Claimant stated he had back pain and some upper back pain. Claimant's secondary complaint was of pain in his left anterior thigh (EX B, at 23). In his reports from this time period and in his hearing testimony, Dr.

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[6] Claimant spent several months exploring the jobs of locksmith and Medical Equipment Repairer with the guidance of Roberto Cruz, the IVE (CX 13, at 10-11). However, he never began training for these vocations as they were determined to be inappropriate for an individual with his medical restrictions.

[7] Dr. Dodge explained IDET as a procedure where a physician "place[s] a heating coil inside of the disk and heat[s] the disk up to try to enervate via the heat the . . . outer rim of the disk to try and seal a collagen fissure or tear" (TR 101).

Dodge reiterated his earlier opinion that Claimant suffered from degenerative arthritis and degenerative disc disease (TR 80-81; EX B, at18). He stated that Claimant would experience this pain in the future but that there was no disc herniation present to warrant surgical intervention (EX B, at 18).

Claimant also sought the medical opinion of Bruce Van Dam, an orthopedic spine specialist (CX 21). Dr. Van Dam performed a medical evaluation of Claimant on May 8, 2000. Claimant told him that his pain extended from his lower back into his buttocks and lower thighs "bilaterally and fairly equally" and that he was more comfortable standing and walking than he was sitting (CX 21, at 2). He reported no pain below the knee. Dr. Van Dam diagnosed Claimant with degenerative disk disease L2-3, L3-4, L4-5, and L5-S1. He found that Claimant had no "neurologic component to this injury" but was in chronic mechanical lumbosacral pain, and specifically noted that there was no need for surgical intervention (CX 21, at 7). He stated that Claimant had been permanent and stationary since June 3, 1997 (CX 21, at 7). He limited Claimant's work activity to "light work," with no lifting over 20 pounds.

While he has a long history of medical attention and has had several vocational rehabilitation attempts, Claimant has remained unemployed since he left his job with Employer. Employer presented four labor market surveys conducted by Joyce Gill, a vocational counselor, to show that Claimant could have obtained employment after June 3, 1997, when Dr. Dodge declared him permanent and stationary. Ms. Gill performed labor market surveys on December 16, 1997, May 15, 1998, May 26, 2000, and June 29, 2000 (EX H, at 129, 158, 167). Claimant contests his ability to perform many of the jobs presented by Employer, and further contends that after his retraining in food preparation he diligently sought re-employment with no success. He testified that he applied to about 40 jobs (TR 37), and presented his job search records and notes to support his statement (CX 20). Ms. SinClair's notes reflect that Claimant did in fact apply to a number of jobs after he completed his second vocational rehabilitation program, although his job search efforts were not always maximal (CX 16, at 35-36, 40-52). Ms. SinClair reported that Claimant had difficulty filling out applications and that he needed help in his physical presentation (EX 16, at 34-52). She also specifically noted that Claimant was "not following up on job leads in a timely manner," and that he went to potential job sites with a friend who was seeking the same positions (EX 16, at 43, 47, 48). In addition, Claimant admitted that he did not contact any employers more than once, but would simply wait indefinitely for them to return his initial calls or communications (TR 58).

Claimant further contends that, in addition to the restrictions caused by his work injury, his epilepsy impacts his ability to gain employment. Although it appears that Claimant has had periods in his life where his epilepsy did not greatly impact his ability to function, he asserts that he has recently experienced increasing numbers of "blackouts." His driver's license was suspended on January 13, 1999 because of his lapses in consciousness (CX 23, at 1). Claimant contends that his inability to drive greatly limits his mobility, and therefore his ability to gain and maintain employment, and that his epilepsy also precludes him from performing jobs that require climbing or maintaining precise uninterrupted attention.

B. Discussion

Claimant requests compensation for "temporary" disability from January 21, 1997 through September 11, 1997; permanent total disability from September 11, 1997 to September 9, 1999 while he participated in vocational rehabilitation; continued permanent total disability from September 9, 1999 onward, because Employer has failed to establish a wage earning capacity for him; or, alternatively, permanent partial disability from September 9, 1999 onward based on a wage earning capacity of $240 to $290 a week. *See Claimant's Pre-trial Statement*, at 1-2. Employer asserts that Claimant reached maximum medical improvement on June 3, 1997, and as of that date Claimant was owed compensation based on a wage earning capacity of $400 per week as per Ms. Gill's May 26, 2000 labor market survey; and that as of May 1998, Claimant is owed compensation based on a wage earning capacity of $480 per week based on Ms. Gill's May 15, 1998 labor market survey (EX H, at 162). *See Respondent's Pretrial Statement*, at 11.

1. Nature and Extent of Disability

The parties dispute both the nature and extent of disability in this case. The determination of whether an injury is temporary or permanent is not based on the date that a claimant returns to work, but is based on medical evidence establishing the date at which claimant has received the maximum benefit of medical treatment. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In California, this date is referred to as the date the claimant has become "permanent and stationary." Three doctors determined dates that Claimant became permanent and stationary in this case. Drs. Van Dam and Dodge stated that Claimant became permanent and stationary on June 3, 1997, whereas Dr. Finkenberg determined that Claimant became permanent and stationary on September 11, 1997. Of the physicians who offered opinions in this matter, I give the most weight to Dr. Dodge. Dr. Dodge stated that Claimant had a muscular strain and underlying degenerative disc disease, and clearly explained how he reached his diagnosis (TR 80-81). His opinion remained logical and consistent through his notes and hearing testimony (EX B; TR 72-105). He also explained how and why his medical opinion differed from those of Drs. Finkenberg and Van Dam (EX B, at 1-2; TR 79-81). Further, while he testified on Employer's behalf, there is no evidence of bias in his opinion. He credited Claimant's subjective complaints of pain (TR 82) and stated that Claimant was permanently disabled and could not return to his usual work, neither of which are favorable to Employer's position. After reviewing his records and observing his hearing testimony, I find Dr. Dodge's opinion to be entitled to the most weight in this matter.

I give little weight to the opinions of Drs. Van Dam and Finkenberg. Dr. Van Dam only examined Claimant once, and so is not as intimately familiar with Claimant's condition as is Dr. Dodge, who saw Claimant repeatedly over a period of several years. Further, Dr. Dodge explained that Dr. Van Dam's restrictions were more appropriate for an individual with a herniated disc, but that Claimant's pain does not arise from a disc herniation, based on the MRI evidence, numerous neurological examinations, and Claimant's subjective complaints of pain (TR 80-81). Dr. Finkenberg frequently changed his opinion of Claimant's medical condition, and his notes never coherently set forth a theory of Claimant's pain. He also initially recommended that

Claimant undergo surgery, a recommendation which, based on all the doctors' opinions in the record (including his own later opinion) would have been a mistake. His opinion is entitled to little weight.

Because I afford the most weight to Dr. Dodge's opinion in this matter, and because Claimant underwent no different treatments and made no physical improvement between June 3, 1997 and September 11, 1997, I find that Claimant's condition became permanent and stationary on June 3, 1997.

Once the nature of Claimant's disability is determined, the extent of his disability must be shown. To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular and usual employment due to his work-related injury. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984). A claimant's usual employment is the claimant's job at the time he was injured. There is no dispute that Claimant cannot return to his former occupation. Therefore, I find that claimant has established a *prima facie* case of total disability because his back injury precludes him from returning to work as a shipfitter.

After the Claimant has established a *prima facie* case of total disability, the burden shifts to the Employer to show suitable alternative employment. Generally, an employer shows suitable alternative employment through a labor market survey or through evidence that Claimant is working. However, in *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122 (5th Cir. 1994), the Benefits Review Board held that if an employee is engaged in a vocational rehabilitation program, he may be found to be permanently totally disabled from the date of his maximum medical improvement through his completion of the program. The Board found that although the employer had demonstrated the availability of suitable alternative employment at minimum wage, the claimant could continue to receive total disability compensation while in a vocational training program because he "could not realistically secure that employment" while enrolled in school. *Id.* at 202. The Board noted that to deprive the claimant of disability status while he was in a vocational training program would "place him in a 'Catch 22' position of being unable to work without being expelled from the program, yet being unable to collect total disability compensation because of his undisputed ability to perform minimum wage work." *Id.* at 203. Although the LHWCA does not explicitly provide for the *Abbott* doctrine, it is consistent with *New Orleans (Gulfwide) Stevedores v. Turner*, which found that the "degree of disability is determined not only on the basis of physical condition, but also on factors such as age, education, employment history, *rehabilitative potential*, and the *availability of work* that claimant can perform." *Abbott*, 27 BRBS at 26, citing *Gulfwide*, 661 F.2d 1031, 1037-38 (5th Cir. 1981) (emphasis added). It also furthers the goal of the LHWCA to promote the rehabilitation of injured employees to "enable them to resume their places, to the greatest extent possible, as productive members of the work force." *Abbott* at 26. To prevail under *Abbott*, Claimant must demonstrate that his enrollment in the vocational training program has precluded other employment, that Employer was aware of and did not object to the rehabilitation program, that completion of the program would benefit Claimant by increasing his wage-earning

capacity, and that Claimant has shown full diligence in completing the program. *See Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264, 266-67 (1997).

Claimant asserts that under *Abbott*, he is entitled to compensation for permanent total disability until he voluntarily suspended his job search following his completion of his second vocational retraining program. Claimant testified that he could not have worked while he was undergoing vocational retraining (TR 48-49). His first vocational training program consisted of two hours a day of instruction, five days a week (CX 13, at 3). He stated that during his second vocational training program he was engaged in on-the-job training from 7:45 a.m. to 1:00 or 1:30 p.m. (TR 49).

It is clear that enrollment in the first training program would not have precluded the Claimant from working almost full time at a paying job; further, there is no evidence that the second training program would have precluded him from working at least part time. It is possible that Claimant was physically incapable of working while he completed the programs, or that logistically he was unable to commute between his training sites and potential workplaces, but he presents no evidence to this effect. Rather, Claimant does nothing beyond stating, unconvincingly, that he could not work while he completed the programs.

In addition, Claimant does not even address the other prongs of the *Abbott* test. Most significant, the training he received was unlikely to have resulted in an increased wage-earning capacity (*see infra*) and therefore would not have justified Employer's having to pay him compensation for permanent total disability during the periods of training. Further, if Claimant is to be believed, he is physically incapable of performing the jobs in which he received training. Moreover, based on Dr. Dodge's restrictions, which I accept, Claimant's first training program trained Claimant sufficiently for him to be employable as a janitor, making the second program superfluous. Therefore, Claimant's assertion that he is entitled to permanent total disability until September 9, 1999 under *Abbott* fails. Rather, *Abbott* is not applicable to the facts of this case.

Although Claimant is not entitled to the protection of *Abbott*, he remains entitled to compensation for permanent total disability from the date of maximum medical improvement – June 3, 1997 – until the date by which Employer demonstrates that suitable alternative employment was available. Employer asserts that Claimant had a wage earning capacity on the date he became permanent and stationary. Ms. Gill conducted several labor market surveys which showed that suitable jobs were available in June 1997 (EX H).

Ms. Gill's labor market surveys presented the following jobs, which were available in June 1997: security guard, small products assembler, parking lot attendant/cashier, and automobile service station attendant/cashier, which are classified as light work; and painter's helper, machine operator, and warehouse worker, which are classified as medium work. Ms. Gill found that, in January 1997 wages, Claimant could have made between $200 and $360 per week in these occupations (EX H, June 29, 2000 report at 3; *id*. at 188, 196). No doctor asserted that Claimant would be physically incapable of performing the tasks the light duty jobs required. Further,

Claimant's lack of a driver's license is immaterial to the parking attendant/cashier positions, since parking cars is not required. Also, there is no basis to conclude that Claimant would be unable to make change and use a cash register. Therefore, I find that Claimant could have obtained work in one of the light duty positions in June 1997. In addition, based on Dr. Dodge's limitation of no very heavy work, Claimant should have been able to perform the work required of the medium duty positions, which only required lifting 20-50 pounds occasionally. According to Ms. Gill's surveys, Claimant needed no special skills to obtain work in these areas. Therefore, I find that Claimant also could have obtained work in the medium duty positions in June 1997, and Employer has successfully shown that Claimant could have performed suitable alternative employment after June 3, 1997. Since Ms. Gill did not indicate which of these jobs Claimant was most likely to obtain, I find that his wage earning capacity as of June 3, 1997 was $280 a week, the mid-point between $200 and $360.

Employer also asserts that Claimant was able to gain employment as a food assembler on March 20, 1998, prior to his training in that field. *See Respondent's Pretrial Statement*, at 11. I find that Claimant could not have obtained work as a kitchen food assembler until the end of June 1999, when he completed his second vocational rehabilitation, which was in food service (TR 47; CX 16, at 36). However, despite his protestations to the contrary, Claimant was qualified, as of May 1998, to find work as a commercial cleaner or janitor, the field of his first rehabilitation program, and was physically capable of performing that work. Ms. Gill identified jobs as a commercial cleaner and janitor in her May 1998 labor market survey (EX H, at 229). The commercial cleaner jobs are classified as heavy work, and the jobs found required Claimant to lift up to 75 pounds, which is within Dr. Dodge's restriction of no very heavy work. The wages in these jobs ranged from $250 through $280 per week in January 1997 wages (EX H, at 230). Ms. Gill also identified jobs as a janitor (EX H, at164). These jobs are classified as medium work, with no lifting over 50 pounds (EX H, at 165-66). The wages ranged from $200 through $260 per week in January 1997 wages (EX H, at 238). Therefore, although the training he received in commercial cleaning may have opened up additional jobs for the Claimant, it did not increase his wage-earning capacity above $280 a week.

Finally, Ms. Gill presents jobs as a hospital food service worker, kitchen food assembler, and cook based on Claimant's second vocational rehabilitation, which he finished at the end of June 1999 (EX H, at 246).[8] The jobs as a hospital food service worker were classified as medium

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[8]Ms. Sinclair conducted a labor market survey over a year previously which also identified jobs for which Claimant was qualified (CX 16, at 26). Ms. Sinclair identified three available jobs in the industry, and reported that Claimant's average starting salary would be $315 per week (CX 16, at 27). Ms. Sinclair believed that work was reasonably available for Claimant in the industry. I do not rely on Ms. Sinclair's survey in determining suitable alternative employment or Claimant's wage earning capacity because I find that Ms. Sinclair's presentation of only three jobs is insufficient to establish suitable alternative employment. Moreover, Ms. Gill's surveys are more detailed and complete, and I will rely on her findings.

work and paid from $250 through $420.40 per week in January 1997 (EX H, at 247).[9] However, those positions offering the higher wages indicate that the wage rate would be based on experience, indicating that Claimant was likely to be paid at the lower end of the scale. The jobs as a kitchen food assembler were classified as light work and paid from $232 through $240 per week (EX H, at 254). The job as a cook was classified as medium work and paid $312 per week in January 1997 (EX H, at 261). All of these jobs are within Claimant's physical restrictions. However, Claimant has no qualifications to be a cook, according to the record, and I will not consider this position in determining his suitable alternative employment or wage earning capacity. The jobs of food assembler and hospital food service worker are appropriate for Claimant. The *Dictionary of Occupational Titles* lists no tasks for these jobs that are outside of Dr. Dodge's restrictions (EX H, at 253). In addition, Claimant chose the vocational rehabilitation program himself and completed retraining in food service. Thus, from July 1, 1999 onward, Claimant was capable of working in the food service industry with a wage-earning capacity comparable to that of the other jobs located by Ms. Gill.

Once the employer presents evidence of suitable alternative employment, the burden shifts back to the claimant to show that he diligently searched for work and was unable to secure a job. *See Palombo v. Director, OWCP*, 937 F.2d 70 (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199 (4th Cir. 1984). Claimant will still be found totally disabled if he can carry this burden. The court in *Palombo* articulated a Claimant's burden in showing due diligence, explaining that the claimant,

> is not required to show that he tried to get the identical jobs the employer showed were available. The claimant merely must establish that he was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available."

Palombo, 937 F.2d at 74, quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). Once the claimant has offered evidence of a job search, the administrative law judge "should make specific findings regarding the nature and sufficiency of claimant's alleged efforts." *Palombo*, 937 F.2d at 75.

Claimant asserted at the hearing, and his job search records reflect, that he contacted the employers in Ms. Gill's labor market survey and some of the employers suggested by Ms. Sinclair (TR 45, 60; CX 16, 20; EX H, at 6-11). Claimant testified that he contacted the employers on Ms. Gill's labor market surveys at his attorneys' instruction (TR 42-43), and apparently did not apply to any jobs other than those on Ms. Gill's labor market survey until after he completed his second vocational training program. In addition, Claimant contacted the names listed on

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[9] Ms. Gill did not provide wages for July 1999, when Claimant could have obtained work in this area.

Employer's labor market survey only once, and they did not offer him employment. Further, Claimant's notes indicate that he spent only three days in January 1998 and unspecified days in August 1998 contacting employers (CX 20). He has not shown evidence of any other job applications or contacts during this time. Further, if his disorganized and short-hand notes are indicative of his overall presentation of himself to employers, Claimant did not make a concerted effort to gain employment with the employers he did contact. Finally, as noted above, claimant admitted that he told prospective employers that he could do only light-duty jobs.

Claimant also alleges that he was unable to find employment after he completed his second job retraining program, asserting that he is entitled to total disability benefits through September 9, 1999, when he voluntarily discontinued his job search. Ms. Sinclair's notes indicate that Claimant's search was insufficient to constitute due diligence. Claimant did not follow up on job leads, and he admitted on cross examination that he did not contact any employers more than once, but would simply wait indefinitely for them to return his initial calls or contacts (TR 58). Based on a thorough review of Claimant's notes and testimony and Ms. Sinclair's notes, Claimant did not make a concerted and consistent effort to find employment after completing his second vocational rehabilitation training.

Despite this lack of effort, claimant received two job offers. First, he was offered a job as a warehouse worker in 1997 (TR 41). He testified that he turned it down because it required heavy labor, such as unloading furniture and televisions (TR 40). He did not identify the employer who offered him the job, but Ms. Gill's December 16, 1997 labor market survey lists only three companies with openings for warehouse workers (although one of these companies had six job openings), and each of these listings indicate that no heavy work is required (EX H, at 151). Moreover, none of these listings indicate that the companies deal with such items such as televisions or furniture. Claimant also testified that after he finished his training as a food service worker, he was offered a job by a popcorn company (TR 57; CX 16, at 47). Based on Ms. Sinclair's reports, this occurred in early August, 1999 (CX 16, at 47). The record does not indicate the physical duties this job required, but Claimant stated that this job was conditioned on the company's receipt of a note from his doctor stating that he could meet the physical demands of the job. He testified that he obtained a note from Dr. Finkenberg and presented it to the company, which then rescinded the job offer (TR 58). Claimant further testified that he did not read the note and has no knowledge of what it said (TR 58). However, Ms. Sinclair's reports indicate that the Claimant did not obtain a note from Dr. Finkenberg at that time because the doctor wanted to see the Claimant before giving him a release to return to work (CX 16, at 48-49). When Claimant did finally receive a note from Dr. Finkenberg, which was dated September 2, 1999, it stated that Claimant was totally disabled until September 21, 1999 (*id*. at 52).

It is not Employer's responsibility to act as an employment agency for Claimant; Employer does not fail to meet its burden simply because Claimant does not gain employment with the exact organizations listed on Employer's labor market survey. Claimant has failed to show due diligence in his job search after Employer showed suitable alternative employment existed as of June 3, 1997. Further, he turned down two jobs, at least one of which it appears he could have

performed. Therefore, I find that the Claimant could have returned to work on June 3, 1997, and that his disability changed from temporary total to permanent partial on this date.

Next, since claimant's back injury is not covered under the schedule in §8(c), Claimant's loss of wage-earning capacity must be determined so that his compensation can be calculated in accordance with §8(c)(21). The parties stipulated that Claimant's average weekly wage at the time of his injury was $531.40. Employer has shown that Claimant could have found suitable alternative employment as of June 3, 1997 at an average weekly wage of $280. Therefore, Claimant is entitled to compensation for permanent partial disability based on a loss of wage-earning capacity of $251.40 per week commencing on June 3, 1997.

2. Future Medical Care

Under §7 of the Act, Claimant is entitled to appropriate medical treatment for his back injury. However, Employer apparently wants me to rule that the Claimant will not require surgery in the future due to this injury *See Respondent's Pretrial Statement*, at 9. At the hearing, Dr. Dodge testified at some length on the subject of potential surgery and future treatment. He stated that Claimant had no disc herniation and he did not believe that the disc was causing Claimant's pain (TR 80-81). Furthermore, all of the medical experts, even Dr. Finkenberg, believe that at this time surgery would not help the Claimant. However, it is impossible today to find out that surgery will not be an appropriate treatment at a later date. Dr. Dodge acknowledged that Claimant has a bulging disc and stated that "we don't even know as we sit here today if the disc is the culprit of his symptoms" (TR 81, 86). None of the medical experts have concluded that surgery could never be an appropriate treatment for claimant's back pain. Accordingly, there is no basis at this time to issue an order that future medical benefits cannot include surgery.

3. Section 8(f) Special Fund Relief

Employer additionally filed an application for limitation of liability under §8(f) with the District Director. Employer based its request on Claimant's two prior back injuries in 1986 and 1990.[10] While it submitted no evidence of it in its application for §8(f) relief, Employer also mentions Claimant's epilepsy in its prehearing statement as a ground for §8(f) relief.

Section 8(f) of the Act may be invoked by an employer to limit its liability for compensation payments for permanent disability to 104 weeks if the following elements are present: (1) the claimant has a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the disability which exists after the work-related

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[10] It is somewhat unclear whether Employer seeks relief based on Claimant's back injuries from 1981 or from 1990. Employer states in its prehearing brief that it seeks relief based on 1981 and 1986 back injuries, but proceeds to describe injures from 1986 and 1990. *See Respondent's Pretrial Statement*, at 13. Because Employer describes the 1990 injury, I will assume it seeks relief based on this injury and not the injury from 1981.

injury is not due solely to the injury, but is a combination of the work injury and the pre-existing permanent partial disability. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949). Further, in the case of a resulting permanent partial disability, the disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. *See e.g. Director, OWCP v. Bath Iron Works (Johnson)*, 129 F.3d 45, 31 BRBS 155 (CRT) (1st Cir. 1997). A pre-existing condition qualifies as a permanent partial disability under §8(f) if the condition is "sufficiently serious so that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of compensation liability." *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420, 425 (1990). The mere fact that an employee suffered a prior injury is, in and of itself, insufficient to establish a pre-existing permanent partial disability. Instead, "[t]here must exist, as a result of that injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46 (9th Cir. 1991).

Employer cites Claimant's prior back injuries as grounds for §8(f) relief. Claimant's prior back injuries were both suffered while employed at NASSCO, and Employer paid compensation to Claimant under the Act for these injuries, so there can be no doubt that Employer was aware of these injures prior to January 1997 (EX P, at 374).

While Employer easily establishes that it was aware of Claimant's prior injuries, it encounters more difficulty in meeting other prongs of the test for Section 8(f) relief: first, that the claimant had a pre-existing permanent partial disability; and second, that the disability that exists after the work injury is a combination of the work injury and the pre-existing permanent partial disability. The evidence submitted by Employer does not clearly indicate that either of Claimant's earlier back injuries resulted in permanent partial disability to Claimant (EX P, at 382, 393). In fact, the only medical evidence from the time of the injuries indicates that Claimant had no permanent disability and no limitation of his physical ability. Regarding his 1986 injury, Dr. Dickinson reported in late November 1986 that Claimant complained of occasional aching in his back but had no objective findings of continued injury (EX P, at 282). Dr. Dickinson released Claimant to work "without disability" (EX P, at 382). There appears to have been no contention of permanent disability after Claimant fully recovered from the 1990 injury, as he was released to full duty without an impairment rating about a month after the injury (EX P, at 393). While Claimant's pre-existing disability does not need to affect his ability to work in his regular job to entitle an employer to §8(f) relief, there still needs to be some evidence of a permanent disability. Here, the only evidence in the record indicates that there is no permanent disability resulting from either previous injury. Therefore, it appears that Claimant had no permanent disability from either of his previous back injuries.

Further, there is little evidence that the disability that exists after the work injury is a combination of the work injury and the pre-existing permanent partial disability. Dr. Dodge asserted that in January 1997 Claimant "sustained a muscular strain to the back which has appeared to have aggravated his pre-existent asymptomatic degenerative disc disease" (EX B, at 18). However, he testified clearly at the hearing that degenerative disc disease is common in "somebody of his age" (TR 73), and went on to say that "we have to understand that

[degenerative disc disease] is something we all get. It's kind of like getting a wrinkle on your face. We all get degenerative disk disease" (TR 81). Normal degenerative disc disease is not a permanent partial disability for the purposes of §8(f). *See Director, OWCP v. Berkstresser*, 921 F.2d 306, 310-11 (D.C. Cir. 1991). In addition, the doctors who treated Claimant at the time of his 1986 and 1990 injuries did not note degenerative disc disease as a cause of his pain. Thus, there is no evidence that Claimant's degenerative disc disease resulted from his 1986 or 1990 injuries, particularly in light of Dr. Dodge's testimony that every person gets degenerative disc disease.

While Claimant clearly has a history of back injuries, that alone is insufficient to establish Employer's entitlement to §8(f) relief. There is little evidence that Claimant had any residual disability from his prior injuries. Dr. Dodge asserts that his current disability is caused by the effects of the 1997 back injury on Claimant's preexisting asymptomatic degenerative disc disease. But there is no evidence that his 1986 or 1990 injuries caused or contributed to his degenerative disc disease, and the degenerative disc disease is a normal finding in a man Claimant's age. Therefore, the evidence fails to establish that Claimant had a pre-existing disability due to a back condition.

There is no question that Claimant's epilepsy is a pre-existing permanent partial disability. The record demonstrates that Claimant had epilepsy since infancy, and that his driver's license had been suspended due to his epilepsy before December 1997 (EX P, at 136). In addition, Employer seems to have been aware of Claimant's epilepsy before his January 1997 injury, as his medical records state that he fell from a ladder in 1990 because he experienced a blackout (EX P, at 391). Employer has more difficulty connecting Claimant's epilepsy to his current disability, however. In revoking Claimant's license, the Driver Safety Officer noted that Claimant had stated that his epilepsy had been well-controlled until his back injury in January 1997, and that thereafter his increased stress "led to breakthrough partial complex seizures" (CX 23, at 2). However, the record fails to show whether the Driver Safety Officer has medical expertise or how he reached his conclusion that there was a relationship between Claimant's 1997 back injury and the epilepsy; and there is no expert medical evidence in the record supporting that link. Employer further states that Claimant's epilepsy reduces his wage-earning capacity, stating that Claimant cannot obtain work in commercial driving because his licence was revoked. Employer undoubtedly is correct that Claimant's epilepsy reduces the range of jobs in which Claimant can seek employment. However, Employer provides no evidence that the wages of the jobs that Claimant cannot apply for due to his epilepsy are higher that the wages of the jobs which are available to him despite the epilepsy. Absent such evidence, Claimant's epilepsy cannot be grounds for §8(f) relief for Employer.

ORDER

IT IS ORDERED that:

1. Employer shall pay to Claimant:

a. compensation for temporary total disability from January 22, 1997 through June 2, 1997, based on Claimant's average weekly wage of $531.40;

b. compensation for permanent partial disability from June 3, 1997 and continuing, based on a loss of wage-earning capacity of $251.40 per week.

2. Employer shall pay all medical benefits resulting from the January 21, 1997 injury to Claimant's back.

3. Employer shall pay interest on all payments of compensation from the dates due until paid, in accordance with 28 U.S.C. §1961(a).

4. Credit shall be given for all previous payments of compensation and medical benefits.

5. Employer's claim for a limitation of liability under §8(f) of the Act is denied.

6. Claimant's counsel shall file a fee petition within 30 days of his receipt of this decision, which will be considered concurrently with the fee petitions of Claimant's previous attorneys (*see* CX 27). Counsel for the Employer shall file any objections to these fee petitions within 15 days of receipt of Claimant's counsel's fee petition.

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JEFFREY TURECK
Administrative Law Judge

–security guard (EX H, 6/29/00 report). This job is classified as light work. Starting weekly wage $200-$280.
–assembler, small products (EX H, 6/29/00 report at 8). Light work. Weekly wages–$200-$280 in June 1997.
–Painter's Helper (EX H, at 190). Medium work. Lift 20-50 lbs occasionally; $200-$400/week in June 1997 (EX H, at 191).
–Machine Operator (EX H, at 198). Medium work; lift 20-50 occasionally; $220-240/week in June 1997 (EX H, at 199, 203).
–Warehouse Worker (Ex H, at 206). Medium work; $200-320/week
–Parking Lot Attendant/Cashier (EX H, at 214); light work; $200-220/week in June 1997 (EX H, at 219-21)
–Automobile service station attendant/cashier (EX H, at 222); light work; $200-220/week (EX H, at 227-228)

Stipulations:
TTD 1/22/99–8/24/97, $354.27/week
PPD 8/25/97–12/28/97, $354.27/week
State Workers Comp–vocational rehabilitation maintenance 12/29/97–6/14/98, $216.48/week;
6/15/98–9/9/99, $246/week per court order–not stipulated to, find in ER's exhibits
State guidelines–Permanent disability 6/15/98–present, $160/week
AWW of $531.40 at time of injury (TR 5); jurisdiction; ER-EE relationship; 1/21/97 back injury (TR 5)

Claimant Requested Compensation:
"Temporary Disability" 1/21/97–9/11/97
PTD 9/11/97–9/9/99 while in vocational rehabilitation (Sept 11, 1997–Dr. Finkenberg finds p&s)
PTD 9/9/99-continuing b/c Ds haven't established WEC

OR–
PPD 9/9/99–continuing based on WEC of $240-290/week (LMS of Bonnie Sinclair)

Respondent's Contentions:
MMI/P&S–6/3/97 (Drs. Dodge & Van Dam)
Future Medical Care–surgery not necessary
Suitable Alternative Employment–LMS 12/16/97, 5/15/98, 5/26/00
WEC–$400/week since date of MMI (Joyce Gill LMS); $480/week since **5/15/98** (date completed janitorial training)
Credit